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No. 77-1174

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1977. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to February 14, 1978, and the petition was filed on February 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in ruling that a defense witness could be cross-examined concerning the length of the sentences that the witness had received on two prior felony convictions.

2. Whether petitioner's right to a fair trial was prejudiced by the prosecutor's final argument or by the cross-examination of a defense witness concerning the offense of perjury.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute cocaine and of distributing cocaine, in violation of 21 U.S.C. 846 and 841(a)(1).[1] Petitioner was sentenced on each count to concurrent terms of five years' imprisonment followed by ten years' special parole, and fined $10,000. The court of appeals affirmed without opinion (Pet. App. A).

The government's evidence showed that Officer Chris Jackson, a member of the New York Drug Enforcement Task Force, met with one Billy Vernon for the purpose of arranging a narcotics purchase (Tr. 20). Vernon, after holding a private conference with Lester Bell, petitioner's brother, informed Jackson that petitioner would bring two ounces of cocaine to Vernon's apartment to sell to Jackson (Tr. 23). Jackson and Vernon proceeded to the apartment, where they were joined by petitioner and Lester Bell (Tr. 23).

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[1]Co-indictees Billy Vernon and Donald Payden were convicted in a separate jury trial held while petitioner was a fugitive. Petitioner's additional co-indictees—Lester Bell and Jacqueline Smalls—pled guilty to conspiracy.

After being introduced to Jackson, petitioner removed a cellophane bag containing cocaine from his jacket pocket and displayed the contents (Gov't. Ex. 1; Tr. 25, 60). Jackson questioned petitioner regarding the quantity and quality of the drugs. After a short discussion, a purchase price of $1,900 was agreed upon (Tr. 25-26). Petitioner gave Jackson the cocaine, took the $1,900, and left (*id.* at 26).

After petitioner and his brother had gone, Jackson weighed the cocaine and discovered that the package was underweight by one-quarter ounce (Tr. 27). Shortly thereafter, Jackson met Lester Bell at a restaurant and confronted him with the fact of the shortage. Lester replied that Jackson would have to speak to petitioner about the shortage, but that petitioner was not there at that time (*ibid.*). When Jackson returned to the restaurant later on, petitioner was there and gave Jackson a small package of cocaine to make up for the shortage (Gov't. Ex. 2; Tr. 34, 61-62).[2]

ARGUMENT

1. The district court ruled at trial (Tr. 90-91) that petitioner's brother, Lester Bell, who testified as a defense witness, could be cross-examined regarding his prior felony convictions and the sentences he had received on those convictions. Thereafter, on direct examination, Lester Bell admitted that he presently was serving a sentence of 15 years to life for kidnapping, that in 1974 he was placed on probation for possession of a firearm, and that he had received a concurrent term of five years'

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[2]Approximately six weeks later, after he had been arrested and advised of his *Miranda* rights, petitioner admitted that he had been dealing in cocaine but was unable to recall the sale to Jackson (Tr. 76).

imprisonment and a special parole term of ten years for his conviction in the instant narcotics conspiracy (Tr. 96-97). Although petitioner concedes (Pet. 6) that evidence of the witness's prior convictions was admissible for impeachment purposes, petitioner contends (Pet. 6-9) that the district court committed reversible error in ruling that the government could also adduce the length of the sentences Lester Bell received on those convictions.

Petitioner's contention is without merit. Rule 609(a) of the Federal Rules of Evidence provides that "the credibility of a witness" may be attacked by "evidence that he has been convicted of a crime * * *." Petitioner concedes (Pet. 7) that in establishing that a witness "has been convicted of a crime," the witness may be questioned regarding the essential facts of his conviction, including the name of the offense, and the time and place of the conviction. See *United States* v. *Finkelstein*, 526 F. 2d 517, 529 (C.A. 2), certiorari denied *sub nom. Scardino* v. *United States*, 425 U.S. 960; *United States* v. *Harding*, 525 F. 2d 84, 88-90 (C.A. 7); *United States* v. *Miller*, 478 F. 2d 768, 769-770 (C.A. 4); *United States* v. *Mitchell*, 427 F. 2d 644, 646-647 (C.A. 3).[3] Petitioner's narrow claim is that the length of the witness's sentence is not an essential fact of the conviction that may be adduced under Rule 609.

The courts that have addressed petitioner's claim have uniformly rejected it and have permitted witnesses to be cross-examined concerning the length of their criminal sentences. See *United States* v. *Harding, supra*, 525 F. 2d

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[3]Petitioner's reliance (Pet. 7) on *United States* v. *Mitchell*, 427 F. 2d 644 (C.A. 3), is misplaced. In *Mitchell*, the court of appeals approved a district court instruction that limited cross-examination to "the name of the crime, the time and place of conviction, *and the punishment for it* * * *." *Id.* at 646 (emphasis added).

at 88-90; *United States* v. *Miller, supra*, 478 F. 2d at 769-770; *United States* v. *Mitchell, supra*, 427 F. 2d at 646-647. See also *McCormick on Evidence* § 43, p. 88 (1972 ed.).[4] The sentencing process recognizes that there are differing degrees of culpability within the definition of a single offense. The length of a criminal sentence is thus a significant objective fact that constitutes a meaningful aspect of the offense for which the witness was convicted.

It is true, as petitioner contends (Pet. 7), that Rule 609 does not allow a particularized inquiry into the underlying details of the witness's prior crime. See *United States* v. *Dow*, 457 F. 2d 246, 250 (C.A. 7), *United States* v. *Bray*, 445 F. 2d 178, 182 (C.A. 5). This is especially so when evidence of aggravating or violent aspects of the offense is sought to be introduced. See *United States* v. *Canaday*, 466 F. 2d 1191 (C.A. 9), *United States* v. *Mitchell, supra*, 427 F. 2d at 646-647. In the present case, however, the court did not allow inquiry into the circumstances underlying Lester Bell's prior offenses. Rather, the court restricted the scope of impeachment to

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[4]One apparently inconsistent case, *United States* v. *Tumblin*, 551 F. 2d 1001 (C.A. 5), is distinguishable. In *Tumblin* the court of appeals reversed a conviction where an entire scheme of cross-examination had been designed to show that, as the result of a lengthy series of prior convictions, the defendant had spent virtually his whole adult life in prison. The court emphasized that this line of examination was impermissible because it was designed to show that the defendant was "a 'bad seed,' as opposed to implying merely that his credibility as a witness is questionable * * *." *Id.* at 1005.

By contrast, there was no lengthy and improperly motivated examination of the witness's prior offenses in the present case, nor was there any occasion for concern about prejudice to the witness, as there may be when the defendant testifies. The brief and limited examination in this case (see Tr. 103) did not overstep the boundary—suggested in *Tumblin*—between proper and improper use of prior conviction evidence.

that information setting forth the essential facts of the conviction itself. See, *e.g., United States* v. *Harding, supra,* 525 F. 2d at 88-90; *McCormick on Evidence, supra,* at p. 88.

Nor is there merit to petitioner's claim (Pet. 9) that the sentencing information adduced at trial was unduly prejudicial. The Federal Rules of Evidence expressly authorize the trial court to admit all relevant evidence, including prior conviction evidence, if, in its discretion, the court determines that the probative value of the evidence outweighs its prejudicial effect to the defendant. Fed. R. Evid. 403, 609(a). The trial court's ruling in favor of admitting the evidence in this case is reversible only for a clear abuse of discretion. See, *e.g., United States* v. *Carter,* 528 F. 2d 844, 846-847 (C.A. 8), certiorari denied, 425 U.S. 961; *United States* v. *Wright,* 489 F. 2d 1181 (C.A.D.C.).

The evidence here was certainly relevant and of substantial probative value. The length of Lester Bell's kidnapping sentence, and the fact that he had received a concurrent sentence for his most recent conviction, was clearly relevant in determining the weight that the jury should assign to his testimony. The jury could reasonably infer from the substantiality of the witness's prior convictions that his testimony favoring his brother's innocence should not readily be accepted as outweighing the contrary testimony of the federal agents.[5] Furthermore, the evidence used to impeach Lester Bell did not unduly prejudice petitioner. The inquiry touched only

[5]Certainly the prospect of further punishment for perjury would have a materially reduced deterrent effect for an individual already sentenced to life imprisonment.

upon the witness's credibility and did not relate to activities of the defendant himself. In this situation, it was entirely proper for the district court to apply the general rule and allow evidence of the length of the witness's criminal sentences to be adduced in cross-examination.

2. Petitioner contends (Pet. 10-15) that he was denied a fair trial when the prosecutor (a) cross-examined Lester Bell regarding the latter's knowledge of the offense of perjury and (b) referred, in her summation to the jury, to the motives that Bell may have had for not telling the truth. Although petitioner objected to the cross-examination, petitioner did not object to the government's closing argument. Accordingly, any error in the summation has been waived by the petitioner. See *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 239; *United States* v. *Braunig,* 553 F. 2d 777, 780 (C.A. 2), certiorari denied, 431 U.S. 959. In any event, as we demonstrate below, both the cross-examination and the summation were proper.

a. At trial, Lester Bell testified that he alone had obtained the cocaine for Jackson (Tr. 98-99). Although admitting that petitioner was present at Vernon's apartment during the sale, Lester Bell asserted that petitioner was in another room during the sale and took no part in the transaction (Tr. 99-100). Lester Bell also testified that it was he who gave Jackson the additional cocaine several days after the original sale (Tr. 101). Defense counsel asked Bell whether his prior convictions would in any way prompt Bell to tell an untruth, and Bell replied, "There is nothing that I can think of would cause me to tell an untruth" (Tr. 97).

On cross-examination, Lester Bell was asked if he was aware that if he should testify falsely he would be guilty of the crime of perjury. Bell replied that he was aware of the

penalty for perjury (Tr. 104). The prosecutor inquired whether the witness was aware of the fact that the sentence for perjury was less than the sentence which he was presently serving, to which the defense objected and the objection was sustained (*ibid.*). The prosecutor asked Lester Bell where he had obtained the cocaine that was sold to the federal agent. After being directed by the court to answer the question, Bell testified that he had "found it on the street" (Tr. 105).

Petitioner's claim that the prosecutor improperly cross-examined Lester Bell concerning his knowledge of the crime of perjury is without merit. It is common practice for the cross-examiner to ask a witness whether he or she understands the obligation to testify truthfully and the possible penalties for failing to fulfill that obligation. *United States* v. *Ross*, 452 F. 2d 656, 658 (C.A. 7).[6] The inquiry was especially justified in this case because it was designed to probe the sincerity of Lester Bell's assurances on direct examination that he would never lie (Tr. 97).

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[6]The cases on which petitioner relies (Pet. 11-13) are inapposite. *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), held only that a witness need not be warned at trial of the penalties of perjury to be convicted for having given false testimony. *United States* v. *Bates*, 468 F. 2d 1252 (C.A. 5), ruled that it is improper for the trial judge, in the presence of the jury, to direct that perjury charges be filed against a defense witness. *Webb* v. *Texas*, 409 U.S. 95, held that it was improper for the trial judge, on his own initiative and in the presence of the jury, to coerce a defense witness into refusing to testify by haranguing the witness with a series of "threatening" and "harassing" statements. The conclusion in *Webb* was based on the fact that the trial court's action had substantially infringed upon the defendant's right to present witnesses in his own defense. *Id.* at 98. The last of the cases relied on by petitioner, *United States* v. *Smith*, 478 F. 2d 976 (C.A.D.C.), held only that a prosecutor may not confront a witness outside the courtroom and coerce the witness into refusing to testify by threatening to bring substantive felony charges (*i.e.*, accessory to murder) against the witness if he takes the stand. *Id.* at 977-979. None of these cases supports the proposition urged by petitioner in this case.

The prosecutor did not infringe upon the jury's independent duty to determine the weight to be accorded to Bell's testimony and hence did not prejudice petitioner's right to a fair trial.

b. The prosecutor's reference in her closing argument (Tr. 120-121) to the possible motives that Lester Bell may have had for testifying falsely did not constitute error, much less plain error. Read in its full context, the prosecutor merely asked the jury to assess Lester Bell's credibility in light of his startling testimony that he found the cocaine on the street, his great interest in the outcome of the case, and the fact that, since he had already received a sentence of 15 years to life, he had little or nothing to lose by attempting to take full blame for the crime. Such an argument did no more than suggest reasonable inferences that could be drawn from the evidence presented, and it was therefore proper. See *United States* v. *Ojala*, 544 F. 2d 940, 946 (C.A. 8); *United States* v. *Serlin*, 538 F. 2d 737, 748; *United States* v. *Bell*, 506 F. 2d 207, 225-226 (C.A.D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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